Supreme Court, U.S.
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No. 92-1367

In The

Supreme Court of the United States

October Term, 1992

NEW CASTLE COUNTY,

Petitioner,

v.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a Connecticut Corporation, et al.,

Defendants,

and

CONTINENTAL CASUALTY COMPANY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

1. Whether the failure of the Court of Appeals to mention an inapposite state trial court decision creates a conflict between the circuits or within the Third Circuit regarding the scope of *West v. American Tel. & Tel. Co.*, 311 U.S. 223 (1940).

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

COUNTERSTATEMENT OF THE CASE 2

A. The Original Proceedings in The District Court 3

B. The First Appeal 4

C. The Proceedings on Remand 5

D. The Second Appeal 5

SUMMARY OF ARGUMENT 7

ARGUMENT 8

THE FAILURE OF THE COURT OF APPEALS TO MENTION AN INAPPOSITE STATE TRIAL COURT DECISION DOES NOT CREATE A CONFLICT BETWEEN THE CIRCUITS OR WITHIN THE THIRD CIRCUIT 8

CONCLUSION 12

TABLE OF AUTHORITIES

Page

Deeper Life Christian Fellowship, Inc. v. Sobol, 948 F.2d 79 (2d Cir. 1991) 8

E.I. du Pont de Nemours & Co. v. Admiral Ins. Co., No. 89C-AU-99, 1990 WL 14200 (Del. Super. Ct. Sept. 19, 1990) 9

Fidelity Union Trust Co. v. Field, 311 U.S. 169 (1940) 7, 8, 9

FL Aerospace v. Aetna Casualty & Sur. Co., 897 F.2d 214 (6th Cir.), *cert. denied*, 111 S. Ct. 284 (1990) 8

Giguere v. United States Steel Corp., 262 F.2d 189 (7th Cir.), *cert. denied*, 360 U.S. 934 (1959) 9

Hamme v. Dreis & Krump Mfg. Co., 716 F.2d 152 (3d Cir. 1983) 8, 9

Herzog v. Colpoys, 143 F.2d 137 (D.C. Cir. 1944) 8

Liberty Mut. Ins. Co. v. Triangle Indus., Inc., 957 F.2d 1153 (4th Cir.), *cert. denied*, 113 S. Ct. 78 (1992) 8

Lowell Staats Mining Co. v. Pioneer Uravan, Inc., 878 F.2d 1259 (10th Cir. 1989) 8

McCoy v. Providence Journal Co., 190 F.2d 760 (1st. Cir.), *cert. denied*, 342 U.S. 894 (1951) 8

Meusy v. Montgomery Ward Life Ins. Co., 943 F.2d 1097 (9th Cir. 1991) 8

National Union Fire Ins. Co. v. Rhone-Poulenc Basic Chems. Co., No. 87C-SE-11 (Del. Super. Ct. Jan. 16, 1992) 7, 9, 10, 11

New Castle County v. Continental Casualty Co., 725 F. Supp. 800 (D. Del. 1989) 3, 4

TABLE OF AUTHORITIES – Continued

Page

New Castle County v. Hartford Accident and Indem. Co., 673 F. Supp. 1359 (D. Del. 1987). 3

New Castle County v. Hartford Accident and Indem. Co., 685 F. Supp. 1321 (D. Del. 1988). 3

New Castle County v. Hartford Accident and Indem. Co., 933 F.2d 1162 (3d Cir. 1991). 4, 9

New Castle County v. Hartford Accident and Indem. Co., 778 F. Supp. 812 (D. Del. 1991). 5, 10, 11

New Castle County v. Hartford Accident and Indem. Co., 970 F.2d 1267 (3d Cir. 1992). . . . . *passim*

Northern Ins. Co. of N.Y. v. Aardvark Assocs., Inc., 942 F.2d 189 (3d Cir. 1991) 8

Peeler v. Village of Kingston Mines, 862 F.2d 135 (7th Cir. 1988) 8

R.W. Murray Co. v. Shatterproof Glass Corp., 697 F.2d 818 (8th Cir. 1983). 8

Remington Arms Co. v. Liberty Mut. Ins. Co., No. 89-420-JLL, 1992 U.S. Dist. LEXIS 20354 (D. Del. Dec. 23, 1992) 11

Transcontinental Gas Pipe Line Corp. v. Transportation Ins. Co., 953 F.2d 985 (5th Cir. 1992). 8

Watson v. Dugger, 945 F.2d 367 (11th Cir. 1991). 8

West v. American Tel. & Tel. Co., 311 U.S. 223 (1940) 7, 8, 9

Williams v. First Fed. Sav. & Loan Ass'n, 651 F.2d 910 (4th Cir. 1981). 8, 9

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Continental Casualty Company ("CNA")[1] respectfully requests that this Court deny the petition of New Castle County (the "County") for a writ

[1] Pursuant to Supreme Court Rule 29.1, respondent represents that CNA Financial Corporation is respondent's parent and that Agency Management Services, Inc. is a non-wholly owned subsidiary of respondent.

of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit in *New Castle County v. Hartford Accident and Indem. Co.*, 970 F.2d 1267 (3d Cir. 1992) ("*New Castle VII*").

COUNTERSTATEMENT OF THE CASE

In *New Castle VII*, the United States Court of Appeals for the Third Circuit reversed and remanded an earlier decision of the United States District Court for the District of Delaware with instructions to enter judgment for CNA. *New Castle VII*, 970 F.2d at 1268. At the conclusion of its opinion, the Court of Appeals declared that "the well of issues in this case, as deep as it may have been, has finally run dry and this seven year insurance litigation ends." *Id.* at 1273. In expressing this view with certitude, the Court of Appeals assumed that this environmental insurance coverage dispute involving, as it does, garden variety state law issues presented no issue for further review.

Unfortunately, the Court of Appeals underestimated the County's interest in prolonging this litigation. To this end, the County has now gone so far as to seize upon utterly irrelevant language in a footnote to a state trial court decision in order to claim (falsely) that there is a conflict between the circuits and, indeed, within the Third Circuit. As discussed below, the County's petition presents no legal question at all, and satisfies none of the "special and important reasons" customarily considered by this Court for granting certiorari.

A. The Original Proceedings In The District Court

This case began in 1985 as a consolidated declaratory judgment action concerning the duty of twelve insurance companies, including CNA, to indemnify and defend the County in connection with claims asserted in four underlying lawsuits arising out of groundwater pollution caused by County landfills at Tybouts Corner ("Tybouts") and Llangollen in Delaware.

Following a seven-day non-jury trial, the district court, on October 23, 1989, issued an order and opinion, *New Castle County v. Continental Casualty Co.*, 725 F. Supp. 800 (D. Del. 1989) ("*New Castle III*"), imposing upon CNA (the only defendant not to settle before trial) the duty to indemnify and defend the County in the three underlying suits relating to Tybouts. In *New Castle III*, the district court found that the occurrence clause[2] and the pollution exclusion clause[3] in

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[2] CNA's policies provide coverage only for damages caused by an "occurrence." An "occurrence" is defined as "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured." *New Castle County v. Hartford Accident and Indem. Co.*, 685 F. Supp. 1321, 1329 (D. Del. 1988) ("*New Castle II*").

[3] The pollution exclusion clause in CNA's policies forecloses coverage for "bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water, but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental." *New Castle County v. Hartford Accident and Indem. Co.*, 673 F. Supp. 1359, 1362 n.4 (D. Del. 1987) ("*New Castle I*").

CNA's policies were coextensive and that the only issue was whether the County expected the damage allegedly caused by Tybouts. *Id.* at 813. Finding that the County did not expect such damage, the district court entered judgment for the County. *Id.* at 820. CNA then filed its first appeal to the Third Circuit.

B. The First Appeal

In *New Castle County v. Hartford Accident and Indem. Co.*, 933 F.2d 1162 (3d Cir. 1991) ("*New Castle V*"), the Court of Appeals reversed the decision of the district court with respect to the pollution exclusion clause. Specifically, the Court drew a sharp distinction between the occurrence clause and the pollution exclusion clause, holding that "the 'occurrence' clause focuses on *damages*, whereas the pollution exclusion clause focuses on *discharges*." *Id.* at 1199 (emphasis in original). Because the district court had erroneously treated the two clauses as one and the same, it had never considered whether the County expected Tybouts to discharge contaminants. Accordingly, the Third Circuit remanded the case to the district court to determine "whether the County expected Tybouts Corner landfill to discharge or release contaminants." *Id.* at 1207. The Court observed that "this shift of focus from damage to discharge may change the outcome of this case." *Id.* at 1169.

C. The Proceedings On Remand

On remand, the County did not dispute that the County expected Tybouts to discharge "leachate" before CNA issued its policies, or that leachate is, in fact, a "contaminant." *New Castle VII*, 970 F.2d at 1269. Rather, the County argued – for the first time in the seven year history of the case – that the pollution exclusion clause in CNA's policies does not bar coverage because the County did not know leachate was a contaminant when it purchased CNA's policies.

In its opinion, the district court found that the County expected the discharge of leachate and that leachate is a contaminant. *New Castle County v. Hartford Accident and Indem. Co.*, 778 F. Supp. 812, 816-17 (D. Del. 1991) ("*New Castle VI*"). Although these two findings were dispositive of the issues posed by the Third Circuit and should have ended the case, the district court held that the pollution exclusion clause was nonetheless inapplicable because the County allegedly did not know that leachate was a contaminant when it contracted with CNA. Relying on this so-called "known contaminant" theory, the district court again entered judgment for the County. Another appeal ensued.

D. The Second Appeal

The issue considered by the Third Circuit on the second appeal was narrowly framed:

> The sole issue we need to address is whether the term "contaminants" in the pollution exclusion clause is plain and unambiguous, or whether it

> can be reasonably construed to contain a scienter element, that is, read so that the clause excludes coverage only if the insured discharges what is known to be a contaminant.

New Castle VII, 970 F.2d at 1270. The Third Circuit resolved the issue in favor of CNA:

> We hold that the term is plain and unambiguous under Delaware law and when a polluter discharges contaminants, whether or not he knows them to be contaminants, coverage is excluded under the insurance policy. We will reverse and remand with instructions to enter a judgment for [CNA].

Id. at 1268.[4] The County then filed a petition for rehearing, which was denied.

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[4] While rejecting the "known contaminant" theory on the merits, the Third Circuit also rebuked the County for failing to raise the issue earlier:

> [The County] waited five years, when it was at the brink of losing, before bringing this issue . . . . While we choose not to decide the waiver issue, this kind of eleventh hour concoction undermines judicial economy as well as the responsible (or irresponsible) litigant's credibility with the court, irrespective of the rules of waiver that may or may not be applicable in these circumstances. Litigants are admonished to refrain from this kind of careless or dilatory practice.

Id. at 1270 n.1. One need look no further than the instant petition – another "eleventh hour concoction" injected into the litigation when the County "was at the brink of losing" – to appreciate the County's disregard for the Third Circuit's admonition.

SUMMARY OF ARGUMENT

In what can only be characterized as a bizarre flight of fancy, the County states in its petition filed with the Court that:

> [t]his diversity case presents an important and far-reaching issue which has given rise to a conflict among the United States Circuit Courts of Appeals, and a conflict within the Third Circuit, and which has never been addressed by this Court. That issue is whether a federal court sitting in diversity may, under *West v. American Telephone & Telegraph Co.*, 311 U.S. 223 (1940) ("*West*"), and *Fidelity Union Trust Co. v. Field*, 311 U.S. 169 (1940) ("*Fidelity Union*"), completely ignore a highly pertinent state court decision, simply because that decision is interlocutory, when predicting how the highest state court would rule.

(County's Petition for Writ of Certiorari ("County's Pet."), p. 11.) In fact, all circuits, including the Third Circuit, have uniformly followed *West* and *Fidelity Union*. And, the "highly pertinent" decision to which the County alludes is a state trial court decision that did not even consider, much less decide, the issue before the Court of Appeals in *New Castle VII. National Union Fire Ins. Co. v. Rhone-Poulenc Basic Chems. Co.*, No. 87C-SE-11 (Del. Super. Ct. Jan. 16, 1992) ("*Rhone-Poulenc*").

ARGUMENT

THE FAILURE OF THE COURT OF APPEALS TO MENTION AN INAPPOSITE STATE TRIAL COURT DECISION DOES NOT CREATE A CONFLICT BETWEEN THE CIRCUITS OR WITHIN THE THIRD CIRCUIT

In *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940), this Court held that a lower state court decision is "datum for ascertaining state law" that should not be disregarded by a federal court unless there is "other persuasive data that the highest court of the state would decide otherwise." *Accord Fidelity Union Trust Co. v. Field*, 311 U.S. 169 (1940). The courts of appeals have uniformly followed *West* and *Fidelity Union*.[5] And, as the cases cited by the County demonstrate, the courts of appeals, including the Third Circuit, have consistently applied *West* and *Fidelity Union* even when the state court decision in question was interlocutory or on appeal. *See Hamme v. Dreis & Krump Mfg. Co.*, 716 F.2d 152 (3d Cir. 1983); *Williams v.*

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[5] *See, e.g., McCoy v. Providence Journal Co.*, 190 F.2d 760, 765 (1st Cir.), *cert. denied*, 342 U.S. 894 (1951); *Deeper Life Christian Fellowship, Inc. v. Sobol*, 948 F.2d 79, 84 (2d Cir. 1991); *Northern Ins. Co. of N.Y. v. Aardvark Assocs., Inc.*, 942 F.2d 189, 193 (3d Cir. 1991); *Liberty Mut. Ins. Co. v. Triangle Indus., Inc.*, 957 F.2d 1153, 1156 (4th Cir.), *cert. denied*, 113 S. Ct. 78 (1992); *Transcontinental Gas Pipe Line Corp. v. Transportation Ins. Co.*, 953 F.2d 985, 988 (5th Cir. 1992); *FL Aerospace v. Aetna Casualty & Sur. Co.*, 897 F.2d 214, 218-19 (6th Cir.), *cert. denied*, 111 S. Ct. 284 (1990); *Peeler v. Village of Kingston Mines*, 862 F.2d 135, 137 (7th Cir. 1988); *R.W. Murray Co. v. Shatterproof Glass Corp.*, 697 F.2d 818, 826 (8th Cir. 1983); *Meusy v. Montgomery Ward Life Ins. Co.*, 943 F.2d 1097, 1099 (9th Cir. 1991); *Lowell Staats Mining Co. v. Pioneer Uravan, Inc.*, 878 F.2d 1259, 1269 (10th Cir. 1989); *Watson v. Dugger*, 945 F.2d 367, 369-70 (11th Cir. 1991); and *Herzog v. Colpoys*, 143 F.2d 137, 138 (D.C. Cir. 1944).

First Fed. Sav. & Loan Ass'n, 651 F.2d 910 (4th Cir. 1981); *Giguere v. United States Steel Corp.*, 262 F.2d 189 (7th Cir.), *cert. denied*, 360 U.S. 934 (1959).[6]

Notwithstanding this uniform authority, the County, relying solely on the failure of the Third Circuit in this case to mention the decision of the Delaware trial court in *Rhone-Poulenc*, contends that a conflict exists on this issue between the circuits and within the Third Circuit. In making this nonsensical argument, the County arrogantly presumes that the Third Circuit "completely ignored" *Rhone-Poulenc* "simply because that decision is interlocutory." (County's Pet., p. 11.) In fact, there is a far more basic explanation – the case had nothing whatsoever to do with the issue before the Third Circuit. (Moreover, we know of no authority requiring a federal court to mention in an opinion every decision it has considered.)

As even the County must acknowledge, the applicability of *West* and *Fidelity Union* is conditioned on the existence of a "relevant" state court decision. (County's Pet., p. 11.) *See, e.g., Hamme v. Dreis & Krump Mfg. Co.*, 716 F.2d at 154 (following decision of intermediate state court that resolved "the same question"); *Williams v. First Fed. Sav. & Loan Ass'n*, 651 F.2d at 927 n.37 (following "precise holding" of lower state court that was "squarely on point"); and *Giguere v. United States Steel Corp.*, 262 F.2d at 193 (following intermediate state court decision that had addressed the "precise issue").

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[6] Indeed, the Third Circuit in this case followed an interlocutory state court decision. *New Castle V*, 933 F.2d at 1196 (following *E.I. du Pont de Nemours & Co. v. Admiral Ins. Co.*, No. 89C-AU-99, 1990 WL 14200 (Del. Super. Ct. Sept. 19, 1990)).

Here, the decision of the trial court in *Rhone-Poulenc* does not satisfy this condition. Indeed, the decision never addressed, let alone resolved, the "precise issue" before the Third Circuit in *New Castle VII* – whether the term "contaminant" within the meaning of the pollution exclusion clause carries a scienter requirement.

In *Rhone-Poulenc*, the trial court considered various defenses raised by insurers on motions for summary judgment, including defenses based on the pollution exclusion clause and the "known loss" doctrine. In addressing the pollution exclusion clause (the only provision at issue in *New Castle VII*), the court in *Rhone-Poulenc* made no mention of the "known contaminant" theory espoused by the district court in *New Castle VI*. (County's Pet., pp. 83a-89a.)[7] The only reference to the theory occurs in a footnote in the context of the *Rhone-Poulenc* court's discussion of the "known loss" doctrine, which involves entirely different considerations than the pollution exclusion clause.[8] (County's Pet., p. 90a n.46.) For the

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[7] As used herein, "(County's Pet., p. ___a)" refers to a page from the unpublished *Rhone-Poulenc* opinion included in the appendix to the County's certiorari petition.

[8] As the court in *Rhone-Poulenc* noted, the "known loss" doctrine precludes insurance coverage if the insured "knew with substantial probability that a loss would occur at the time of the inception of the policies at issue." (County's Pet., p. 89a.) Stated differently, the "known loss" inquiry "focuses on damages." *Id.* The insured's knowledge of whether a discharged substance is a contaminant is plainly relevant in determining the insured's expectation that the substance will cause damage. It is hardly surprising, therefore, that, in deciding the applicability of the known loss doctrine, the court in *Rhone-Poulenc* considered whether the insured in that case knew that it was

County to contend in these circumstances that the court in *Rhone-Poulenc* "adopted" the holding of the district court in *New Castle VI* (County's Pet., p. 10), or that the Third Circuit was in any way bound to discuss *Rhone-Poulenc*, is disingenuous in the extreme.[9]

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discharging a contaminant before it contracted for insurance. At no time, though, did the court in *Rhone-Poulenc* hold that the insured's knowledge of whether a substance is a contaminant has any bearing on the applicability of the pollution exclusion clause, the "precise issue" before the Third Circuit in *New Castle VII*.

[9] Lest there be any doubt about the inapplicability of *Rhone-Poulenc*, the Honorable James L. Latchum, whose adoption of the "known contaminant" theory in *New Castle VI* was reversed by the Third Circuit, recently had occasion to revisit the issue in the wake of *New Castle VII* and *Rhone-Poulenc*. In *Remington Arms Co. v. Liberty Mut. Ins. Co.*, No. 89-420-JLL, 1992 U.S. Dist. LEXIS 20354 (D. Del. Dec. 23, 1992) (applying Connecticut law), Judge Latchum, looking to Delaware law in the absence of Connecticut authority, rejected the "known contaminant" theory advanced by the insured. In so doing, Judge Latchum followed the Third Circuit's decision in *New Castle VII* without ever mentioning *Rhone-Poulenc* and, indeed, observed that *New Castle VII* was decided "in the absence of any Delaware case law or statutory law on [the "known contaminant" theory]." *Remington*, 1992 U.S. Dist. LEXIS 20354 at *12.

CONCLUSION

For the foregoing reasons, CNA respectfully requests that the Court deny the County's petition for writ of certiorari.

Respectfully submitted,

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